Nos. 08-240 and 08-372

In The Supreme Court of the United States

MAC'S SHELL SERVICE, INC., ET AL.,

Petitioners,

v.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Respondents.

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR MAC'S SHELL SERVICE, INC., ET AL.

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QUESTIONS PRESENTED

The Petroleum Marketing Practices Act ("PMPA" or "Act"), 15 U.S.C. §§ 2801-2807, regulates the grounds and manner on which a petroleum refiner must "terminate" or "nonrenew" a service station "franchise." The Act prohibits refiners from terminating or failing to renew a franchise in order to convert a franchise-operated station to a direct operation.

The jury found that Shell Oil Company ("Shell") and others formed a joint venture (Motiva Enterprises, LLC ("Motiva")) to circumvent the Act's restrictions, force franchisees out of business, and convert their stations to company-owned stations. The jury concluded that the franchises were "constructively terminated" when Shell assigned the franchise to Motiva which breached the station leases by ending a rent subsidy that caused such a material increase in monthly rent that it "effectively ended" the lease. The jury also determined that renewal leases offered by Motiva contained new terms that were adopted for the purpose of forcing the franchisees not to renew thereby causing a "constructive nonrenewal" of the franchise relationship.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a franchisee has a cause of action under the Act where, following an assignment of the franchise, the assignee causes a material breach of one of its statutory elements effectively ending the original franchise (No. 08-372).

2. Whether a franchisee has a cause of action under the Act where the franchisee signs the renewal franchise agreement under protest believing that the agreement contains new terms adopted in bad faith and for the purpose of forcing the franchisee not to renew (No. 08-240).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, neither Mac's Shell Service, Inc., Akmal, Inc., RAM Corporation, Inc., nor J&M Avramidis, Inc. have any parent corporation, nor are there any publicly traded companies that own more than ten percent of their stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement	iii
Table of Authorities	vi
Statement of the Case	1
I. Statutory Framework	1
II. Proceedings Below	6
A. Background	6
B. Jury Findings	10
C. Proceedings in the Court of Appeals	12
Summary of Argument	16
Argument	20
I. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE TERMINATION (No. 08-372)	20
A. The Act Authorizes a Dealer to Seek Redress Whenever the Franchisor Fails to Comply with the Requirements of Section 2802 and Vests the Court with Equitable Powers to Remedy Any Such Failure	21
B. A Prohibited Termination Occurs When an Assignment of a Franchise (1) Leads to a Breach of One of the Statutory Elements Effectively Ending the Franchise, Or (2) Is Invalid Under State Law	28

TABLE OF CONTENTS – Continued

Page

C. Analogies to Constructive Terminations in Other Contexts Are Irrelevant and Unpersuasive 36

D. The Statutory Construction Urged By the Solicitor and Amici Does Not Honor the Words or the Intent of the PMPA 40

II. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE NONRENEWAL (No. 08-240) 44

A. The Act Does Not Require Issuance of a Notice As a Condition Precedent To Bringing a Claim That the Franchisor Failed To Comply With Section 2802 45

B. Whether the Dealers "Ratified" or "Accepted" the Motiva Leases Was Not Presented to the Jury 48

C. The Act's Structure and Purpose Support the Holding In *Pro Sales* 51

CONCLUSION 55

TABLE OF AUTHORITIES

Page

CASES:

Abrams Shell v. Shell Oil Co., 343 F.3d 482 (5th Cir. 2003) 29

Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975) 41

American Employers' Ins. Co. v. City of Medford, 38 Mass. App. Ct. 18, 644 N.E.2d 241 (Mass. App. Ct. 1995) 32

April Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28 (5th Cir. 1997) 28

Banc One Fin. Servs., Inc. v. Advanta Mortgage Corp. USA, 2002 WL 88154 (N.D. Ill. 2002) 37

Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986) ..... *passim*

Barney Holland Oil Co. v. FleetCor Techs., Inc., 275 F.App'x 351 (5th Cir. 2008) 36

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 34

Beachler v. Amoco Oil Co., 112 F.3d 902 (7th Cir. 1997) 28, 29, 41 53

Bert Smith Oldsmobile, Inc. v. General Motors Corp., 2005 WL 1210993 (M.D. Fla. 2005) 37

Brown v. Swann, 10 Pet. 497 (1836) 41

Bui v. Ma, 62 Mass. App. Ct. 553, 818 N.E.2d 572 (Mass. App. Ct. 2004) 50

Cabot Corp. v. AVX Corp., 448 Mass. 629, 863 N.E.2d 503 (Mass. 2007) 50

TABLE OF AUTHORITIES – Continued

Page

Carlos v. Philips Bus. Sys., Inc., 556 F. Supp. 769 (E.D.N.Y. 1983).....37

Cedar Brook Serv. Station, Inc. v. Chevron U.S.A., Inc., 930 F.2d 908 (2d Cir. 1991).....28

Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc., 940 F.2d 744 (1st Cir. 1991).....28, 29

County Holding Corp. v. Brati Inc., 2002 WL 1275031 (N.Y. Supp. App. Term. 2002) 38

D'Arcy v. Union Oil Co. of California, 937 F.2d 611 (9th Cir. 1991).....55

Dada v. Mukasey, 128 S.Ct. 2307 (2008).....21, 49

Dave Greytak Enters. v. Mazda Motors of Am., Inc., 622 A.2d 14 (Del. Ch. 1992).....36

Dean v. Kerr-McGee Ref. Corp., 714 F. Supp. 1155 (W.D. Okla. 1988) 51

Dersch Energies, Inc. v. Shell Oil Co., 314 F.3d 846 (7th Cir. 2002) .....*passim*

Dolan v. Postal Serv., 546 U.S. 481 (2006) 21

East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996 (7th Cir. 1989) 36

Ex Parte Wright, 443 So.2d 40 (Ala. 1983) 49

Fresher v. Shell Oil Co., 846 F.2d 45 (9th Cir. 1988).....28, 32

Fuller Ford, Inc. v. Ford Motor Co., 2001 WL 920035 (D.N.H. Aug. 6, 2001).....36

Garcia v. United States, 469 U.S. 70 (1984).....41

TABLE OF AUTHORITIES – Continued

Page

Guzman v. Visalia Cmty. Bank, 71 Cal.App.4th 1370 (Cal. App. 5th Dist. 1999) 50

Harel Assoc. v. Cooper Healthcare Prof'l Servs., Inc., 271 N.J. Super. 405 (1994), 638 A.2d 921 (N.J. Super. 1994) 39

Helvering v. Stockholms Exskilda Bank, 293 U.S. 84 (1934).....26

Hilder v. St. Peter, 144 Vt. 150 (1984), 748 A.2d 202 (Vt. 1984).....39

In re Kirkwood Kin Corp. v. Dunkin' Donuts, Inc., 1997 WL 529587 (Del. Super. 1997).....36

In re Shell Oil Prods. Co. Dealer Franchise Litig., 206 F. Supp. 2d 1373 (J.P.M.L. 2002).....7

Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970).....39

Jones v. United States, 362 U.S. 257 (1960).....39

JPM, Inc. v. John Deere Indus. Equip. Co., 94 F.3d 270 (7th Cir. 1996) 36

Lippo v. Mobil Oil Corp., 776 F.2d 706 (7th Cir. 1985).....16, 46, 52, 53

Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc., 408 N.J. Super. 461, 975 A.2d 510 (N.J. Super. App. Div. 2009).....37

Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (N.J. 1970).....38

May-Som Gulf v. Chevron U.S.A., Inc., 869 F.2d 917 (6th Cir. 1988) 28, 29

TABLE OF AUTHORITIES – Continued

Page

Meyer v. Amerada Hess Corp., 541 F. Supp. 321 (D.N.J. 1982) 51

Minjak v. Randolph, 528 N.Y.S.2d 554, 140 A.2d 245 (N.Y. App. Div. 1st Dep. 1988) 38

O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d Cir. 1989) 2, 43

Petereit v. S.B. Thomas, Inc., 63 F.3d 1169 (2d Cir. 1995) 36

Philadelphia v. Collector, 5 Wall. 720 (1867) 49

Pro Sales, Inc. v. Texaco, U.S.A., 792 F.2d 1394 (9th Cir. 1986) 14, 51, 52

Reste Realty Corp. v. Cooper, 53 N.J. 444 (1969), 251 A.2d 268 (N.J. 1969) 39

Riverdale Enters., Inc. v. Shell Oil Co., 41 F. Supp. 2d 56 (D. Mass. 1999) 32

RKJ Enters., Inc. v. Sun Co., Inc., 1998 WL 833857 (E.D. Pa. Dec. 2, 1998) 51

Robert Basil Motors, Inc. v. General Motors Corp., 2004 WL 1125164 (W.D.N.Y. 2004) 36

Robles-Vazquez v. Garcia, 110 F.3d 204 (1st Cir. 1997) 14, 50

Salve Regina College v. Russell, 499 U.S. 225 (1991) 29

Seckler v. Star Enter., 124 F.3d 1399 (11th Cir. 1997) 16, 23

Shell v. Shell Oil Co., 216 F. Supp. 2d 634 (S.D. Tex. 2002) 54

TABLE OF AUTHORITIES – Continued

Page

Shukla v. B.P. Exploration & Oil Co., Inc., 115 F.3d 849 (11th Cir. 1997) 28, 29

Siecko v. Amerada Hess Corp., 569 F. Supp. 768 (E.D. Pa. 1983) 51

Slatky v. Amoco Oil Co., 830 F.2d 476 (3d Cir. 1987) 2

Speed Auto Sales, Inc. v. Am. Motors Corp., 477 F. Supp. 1193 (E.D.N.Y. 1979) 36

Sun Franchise Ass'n v. Sun Ref. and Mktg. Co., 1992 WL 97359 (E.D. Pa. April 29, 1992) 51

Tsanikilides, et al. v. Shell Oil Prods. Co., Inc., et al., No. 00-11295 (D. Mass. 2000) 10

United States v. Campos-Serrano, 404 U.S. 293 (1971) 21

United States v. State Tax Comm'n of Mississippi, 412 U.S. 363 (1973) 48

United States v. Williams, 514 U.S. 527 (1995) 48

Veracka v. Shell Oil Co., 655 F.2d 445 (1st Cir. 1981) 2

Yonaty v. Amerada Hess Corp., 2005 WL 1460411 (N.D.N.Y. 2005) 33

STATUTES:

Petroleum Marketing Protection Act, 15 U.S.C. §§ 2801-2807 ..... *passim*

15 U.S.C. § 2801 ..... *passim*

15 U.S.C. § 2802 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 2803 ..... 3, 22

15 U.S.C. § 2804 ..... 22, 23

15 U.S.C. § 2805 ..... *passim*

15 U.S.C. § 2806 ..... 5, 6

15 U.S.C. § 2807 ..... 3, 22

28 U.S.C. § 1407 7

Pub. L. 103-371, 108 Stat. 3484 5

M.G.L. c. 106 § 2-210 32

New York General Business Law § 197 *et seq.* 36

New York Vehicle and Traffic Law § 463 36

N.H. Rev. Stat. Ann. § 357-C:1 *et seq.* 36

N.J. Stat. Ann. § 56:10-2 37

Conn. Gen. Stat. § 42-133e *et seq.* 37

Fed. R. Civ. P. 50(a) 13, 14

MISCELLANEOUS:

S. Rep. No. 731, 95th Cong., 2d Sess. (1978) ..... *passim*

H.R. Rep. No. 737, 103d Cong., 2d Sess. (1994) 5

S. Rep. No. 387, 103d Cong., 2d Sess. (1994) 5

Black's Law Dictionary (8th ed. 2004) 26

Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, Emory L. J. 273 (1983) 1, 2

TABLE OF AUTHORITIES – Continued

Page

Restatement (Second) of Property § 5.4 39

Restatement (Second) of Property § 11.3 39

Uniform Commercial Code § 1-207(1) (1990) 49

1 *Corbin on Contracts* § 3.30 (rev. ed. 1993) 50

STATEMENT OF THE CASE

I. Statutory Framework

Legislative History. Congress enacted Title I of the PMPA to address the exploitation of independent gasoline dealer franchisees and to ensure their reasonable expectations of a continuing franchise relationship. S. Rep. No. 731, 95th Cong., 2d Sess. (1978), *as reprinted in* 1978 U.S.C.C.A.N. 873, 874 ("S. Rep."); Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, 32 Emory L. J. 273 (1983) (*Judicial Interpretation*). The record before Congress disclosed wide-spread terminations and nonrenewals of the franchises of independent gasoline retailers and distributors resulting from the great disparity in bargaining power between franchisors and franchisees. S. Rep. at 17. Congress recognized that franchisors took advantage of that disparity in bargaining power to threaten termination and nonrenewal, gain an unfair advantage in contract disputes, and compel compliance with marketing policies, creating a continuing vulnerability on the part of the franchisee to the demands and actions of the franchisor. *Id.* Thus, Congress acted to level the playing field and "to protect franchisees from overbearing, burdensome conduct by the franchisor during the term of the franchise." *Barnes v. Gulf Oil Corp.*, 795 F.2d 358, 362 (4th Cir. 1986).

Congress recognized that franchisees risked "losing completely the return from their prior

investments, and potentially their livelihood, if their franchise agreements are terminated." *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 587 (3d Cir. 1989). Through the Act, Congress sought to "prevent a franchisor from taking over a successful station operation and appropriating the benefit of the goodwill that the franchisee had developed." *Veracka v. Shell Oil Co.*, 655 F.2d 445, 448 (1st Cir. 1981); *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 482-483 (3d Cir. 1987) (Act reflects Congress's concern that major distributors' desire to operate their own stations results in pressing franchisees to sell out or face stiff increases in rent); *Judicial Interpretation, supra* at 279-283. Congress observed, "The prospect of non-renewal for arbitrary or discriminatory grounds threatens the independence of the franchisee as a competitive influence in the marketplace." S. Rep. at 18; *Barnes*, 795 F.2d at 360 (Congress acted to promote competition within the industry).

Statutory Structure. Section 2802(a) of the Act explicitly prohibits the termination of a "franchise"[1] or nonrenewal of a "franchise relationship"[2] except for

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[1] A franchise consists of three elements: a "contract" to use the refiner's trademark, a "contract" for the supply of motor fuel, and a "lease" of the service station. It also includes the "unexpired portion" of a franchise validly assigned under "State law." 15 U.S.C. § 2801(1)(B)(i)-(iii).

[2] A franchise relationship means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and franchisee which result under the franchise. 15 U.S.C. § 2801(2).

specific limited grounds and conditions set forth in section 2802(b)(2) and (3). Franchisors must also satisfy specific notice requirements. *See* 15 U.S.C. §§ 2802(b)(1)(A), 2804.

A franchisee may maintain a civil action "[i]f a franchisor fails to comply with the requirements of section 2802 [addressing terminations and nonrenewals], 2803 [concerning trial and interim franchises], or 2807 [restrictions on installation of renewable fuel pumps] of this title." 15 U.S.C. § 2805(a). In addition to compensatory and potential punitive damages, the Act empowers courts to grant such equitable relief "as the court determines is necessary to remedy the effects of any failure to comply with the requirements of sections 2802, 2803, or 2807 of this title, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief." *Id.* § 2805(b)(1). The court may also grant a preliminary injunction upon a proper showing. *Id.* § 2805(b)(2). While franchisees ultimately bear the burden of proof to establish termination of the franchise or nonrenewal of the franchise relationship within the meaning of the Act, the franchisor bears the burden to establish as an affirmative defense compliance with the Act's requirements. *Id.* § 2805(c).

Each of the grounds for termination and nonrenewal are limited by specific conditions and time limitations. S. Rep. at 33 ("Specific conditions are attached to each of these grounds, including time limitations which are imposed to preclude a franchisor from basing termination or non-renewal upon

old and long forgotten events."). In addition to prohibiting terminations or nonrenewals based on stale complaints, terminations or nonrenewals cannot be based on unreasonable or immaterial franchise provisions. 15 U.S.C. § 2802(b)(2)(A). Franchisees must be advised in writing of alleged failures to carry out provisions of the franchise and afforded reasonable opportunities to carry out the provisions, and any failure must thereafter continue within certain time frames. *Id.* § 2802(b)(2)(B). Reasons for termination or nonrenewal not identified in the Act (as an event making termination or nonrenewal reasonable) are to be carefully scrutinized. S. Rep. at 34.

The Act expressly prohibits a franchisor from attempting to convert the marketing premises to direct operations by its employees or agents. This prohibition is expressed three times in the Act: in section 2802(b)(2)(E), where the franchisor seeks to withdraw from marketing gas in the franchisee's area; section 2802(b)(3)(D)(ii), where the franchisor alters, adds to or replaces the leased-marketing premises or otherwise determines that renewal would be uneconomical; and section 2802(b)(3), where the franchisor and franchisee fail to agree on changes or additions to the terms of the franchise.[3]

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[3] The prohibition in section 2802(b)(3) also applies to any failure to agree on terms where the underlying motive is to "prevent[ ] the renewal of the franchise relationship." 15 U.S.C. § 2802(b)(3)(A)(ii).

The Act preempts any state law that attempts to regulate the grounds for termination or the notice requirements unless they are the same as the Act. *Id.* § 2806(a). Congress, however, intended the Act's preemption to be limited. S. Rep. at 42-43. In 1994, when Congress amended the Act to "affirm and clarify" the Act's provisions, it "reconfirm[ed] the original intent that preemption is limited in scope." H.R. Rep. No. 103-387, 103d Cong., 2d Sess. (1994) at 4.[4] What was preempted, Congress noted, was the grounds for termination and nonrenewal, the notice provisions and the standard (good faith and in the ordinary course of business) used to assess franchisor conduct. S. Rep. at 19.

The Act recognizes the interplay of state law with its provisions and requirements. The 1994 Amendments added that the definition of "failure" in section 2801(13) did not include: "(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof)." At the same time, Congress added a new

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[4] Title I was amended in 1994 (Pub. L. 103-371, 108 Stat. 3484) to "affirm and clarify" certain provisions of the Act by adding certain additional protections for franchisees ("1994 Amendments"). Congress noted that "[d]uring the 16 years since the PMPA was enacted, the provisions of Title I have been . . . the subject of many judicial interpretations. The Committee believes that further direction is desirable in order to assure that the PMPA is consistently and clearly understood and interpreted." H.R. Rep. No. 737, 1994 WL 530965, 1994 U.S.C.C.A.N. 2779. *See also* S. Rep. No. 103-387 at 2, 103d Cong., 2d Sess. 1994 WL 5347750 (same).

provision which prohibits franchisors from requiring a franchisee to release or waive "any right that the franchisee may have under any valid and applicable State Law" and invalidates any provision that specifies that the interpretation and enforcement of the franchise shall be governed by the law of any state other than the state where the franchisee has its principal place of business. 15 U.S.C. § 2805(f). The amendments also added a prohibition against any state law that requires a payment for the goodwill of a franchisee on termination or nonrenewal authorized by the Act. *Id.* § 2806(a)(2).

The Act does not authorize or prohibit assignments, but leaves the validity of an assignment of the franchise to state law. *Id.* § 2806(b)(1). The Act recognizes, however, that state law governing the validity of an assignment may impact the "franchise," which is defined to include the "unexpired portion of any franchise" transferred or assigned as authorized by state law. *Id.* § 2801(1)(B)(iii). Congress left conflicts between the Act and state law to be resolved by the court through general principles of equity, recognizing that "no single statutory principle would be flexible enough to deal with so wide a range of potential conflicts." S. Rep. at 43.

II. Proceedings Below

A. Background

The theory of the case presented at trial was that Shell and Motiva devised a secret plan to take over

operation of their franchises without paying fair value and to circumvent the Act's restrictions on terminations and nonrenewals. J.A. 55-87; 450.[5] The franchise agreement between Shell and the dealers specified a "contract rent" for the use of the Shell-owned service stations.[6] From the start of the relationship, however, Shell told the dealers to "disregard[]" the contract rent, that rent would be calculated using a "permanent" rent subsidy, and that they should plan their businesses around its continued availability. J.A. 431, 444; C.A. App. 1509, 3727-3729. The amount of the subsidy was based upon the volume of gasoline sold. J.A. 430-431. Internal Shell documents confirmed that the subsidy would continue "indefinitely" and dealers were told that notices from

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[5] Separate actions brought by franchisees doing business in Massachusetts, New Hampshire, and Rhode Island were consolidated for pre-trial purposes pursuant to 28 U.S.C. § 1407 in the District of Massachusetts. *In re Shell Oil Prods. Co. Dealer Franchise Litig.*, 206 F. Supp. 2d 1373 (J.P.M.L. 2002). The district court selected ten Massachusetts plaintiffs to proceed with a first phase of discovery and to trial. Of the ten initial plaintiffs, one plaintiff settled his claims and another lost on summary judgment. Plaintiff Mac's Shell operated two stations. Thus, eight plaintiffs operating nine stations proceeded to trial. J.A. 432. The eight trial plaintiffs are referred to as the "dealers." The claims of the remaining Massachusetts, New Hampshire and Rhode Island franchisees were stayed and eventually settled.

[6] The two separate contracts – a lease and a supply agreement addressing fuel supply and trademark rights are referred to collectively as the "franchise agreement." J.A. 239-267; C.A. App. 1395-1410.

Shell that permitted the cancellation of the subsidy upon thirty days notice would only apply in the event of "war or an oil embargo." J.A. 431; C.A. App. 874; 1009-1010; 1858, 1998, 2047, 2101. For nearly two decades, the subsidy was used to calculate monthly rent and as a "tool" to perform the primary function of the franchise: selling gasoline. J.A. 431. The subsidy was "essential" to the dealers' businesses and their decisions to invest time and money into their franchises. J.A. 443; C.A. App. 837, 841, 845, 851, 873-875, 899, 943-944, 964, 975, 997, 1009-1010, 1071.

In the late 1990s, Shell concluded that it could earn greater profits if it converted its franchise stations to company-operated stations. C.A. App. 3646.[7] Paying franchisees fair compensation for their businesses, however, was cost prohibitive.[8] The "restrictions" on franchise terminations and nonrenewals imposed by the Act stood as another impediment which needed to be "overcome." C.A. App. 1530-1533, 1512-1578, 3643-3645. Unwilling to negotiate a buy-out of the franchisees' businesses, Shell devised a plan to force its franchisees out of business. These

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[7] Converting to company operated stations would permit the franchisor to set the retail price for gasoline, which it could not otherwise do. C.A. App. 3646.

[8] One estimate put the cost of purchasing franchisee goodwill at several hundred million dollars. C.A. App. 1512-1578, 2638-2824.

facts are largely ignored by Shell, Motiva, and the Solicitor in their briefs.

Shell and other joint venture partners created Motiva. J.A. 430; C.A. App. 2476-2477. Shell transferred its "marketing assets" and assigned the franchise agreements to the newly formed entity. J.A. 430, 447-448; C.A. App. 2476-2477, 3589, 3715. Motiva eliminated the subsidy, which it knew would cause dramatic increases in rent and other economic harm to the dealers' businesses. J.A. 431; C.A. App. 1150, 1161-1162, 3635-3636. As the term of the Shell leases ended, Motiva presented the dealers with new leases on a "take-it-or-leave-it" basis. C.A. App. 3607-3608, 866. Those leases had additional rent increases and other terms that were designed to discourage the dealers from renewing and to enable Motiva to convert the franchise-operated stations to direct operations. J.A. 375, 382. Motiva expected that the new terms would result in the "closure" of franchise stations. J.A. 375; C.A. App. 3615-3616. If the dealers did not sign the leases, Motiva stated it would not renew the franchise. C.A. App. 976, 999, 2113-2116, 2158-2159, 2161-2162.[9] The dealers – through counsel – protested the new terms, reserved their rights to

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[9] Motiva envisioned that the transition to direct operations would take four to five years to achieve. C.A. App. 3628. Within five years of Motiva's formation, the number of franchise-operated stations in Massachusetts decreased from 177 to 96 while the number of company-operated stations increased from 3 to 40. C.A. App. 941; 2164-2165.

challenge the legality of the renewal leases, brought suit, and then signed the leases under protest. J.A. 129-131, 450.[10]

The economic burden caused by the higher rent forced one dealer to simply "walk-away" from his station without compensation. C.A. App. 1013. Two other dealers sold their businesses below market value. C.A. App. 882-884, 978. A fourth contemplated bankruptcy, but kept afloat by borrowing money and cashing in retirement accounts, C.A. App. 847-851, while another dealer relied upon the assistance of family members who worked without pay. C.A. App. 1001. Two other dealers managed to remain in business by relying upon profits earned from ancillary businesses. C.A. App. 950-961, 917.

B. Jury Findings

The dealers pursued two separate claims arising under the Act. First, the dealers claimed that their Shell franchises were "constructively terminated" when the leases were assigned to Motiva and the subsidy was eliminated. Based upon the oral "representations" made to the dealers, internal Shell

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[10] All but one of the dealers signed their Motiva lease *after* the dealers had filed an initial complaint in a "related" matter, *Tsanikilides, et al. v. Shell Oil Prods. Co., Inc., et al.*, No. 00-11295, in the United States District Court for the District of Massachusetts on June 30, 2000. Each of the dealers was a plaintiff in *Tsanikilides*. J.A. 268-269, 310-325, 330-331, 431-432, 440; Pet. Br. at 11, n. 7.

documentation showing that "franchisees would understand the loss of the subsidy to be a breach of a promise by Shell," and a course of "conduct," the jury determined that the Shell leases included the subsidy. J.A. 376-377, 443-444; C.A. App. 1303-1304, 1309. The jury concluded that the elimination of the subsidy "was such a material change that it effectively ended their leases, even though the [dealers] continued to operate their business," and caused a "constructive termination" of the franchises. J.A. 373, 379-380, 449-450. Second, the dealers alleged that the renewal leases offered by Motiva contained additional rent increases and other onerous terms that were not adopted in "good faith," as required by the Act, but rather were part of the plan to drive the dealers out of business. J.A. 450. The jury determined that the rent increases were designed to discourage the dealers from renewing and enable Motiva to convert their stations to direct operations, and amounted to a "constructive nonrenewal" of the franchise even though the dealers signed new leases. J.A. 374-375, 382.

The jury found Motiva and Shell liable on all counts to all dealers and awarded $1.3 million in damages for the constructive termination claim which included the value of the lost subsidy and related losses in business value. J.A. 376-386, C.A. App. 1304. It awarded an additional $1.2 million for the constructive nonrenewal claim which reflected the amount of rent Motiva charged above "industry standard" as well as related losses in business value. J.A.

376-386; C.A. App. 1306. The jury also found that Shell and Motiva violated various state or common law provisions and awarded additional damages for those breaches.

C. Proceedings in the Court of Appeals

The court of appeals affirmed in part and reversed in part. J.A. 429-462.

1. Addressing the dealers' "termination" claim, the court of appeals held that a franchisee establishes a claim under the Act where an assignment leads to the breach of one of the statutory elements of the "franchise" (*i.e.*, the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the service station). J.A. 444-445.[11] Although the court did not hold that "any material breach of the lease would necessarily be sufficient," it stated that the district court had set an "appropriate threshold" by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447. The court held that there was "ample evidence" for the jury to conclude that the assignment of the franchise to Motiva and the elimination of an "essential" part of the lease – the subsidy – marked the "end of the relationship"

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[11] The court also held that an assignment which violates state law gives rise to a claim under the Act. J.A. 444.

and caused a "constructive termination" of the franchise. J.A. 443, 449-451.

The court agreed with the Fourth Circuit's holding in *Barnes* that an action for constructive termination lies against the assignor of the franchise when the assignee breaches the lease. J.A. 446. This, the court noted, prevents the assignor/franchisor from "shielding itself against liability" through the use of another corporation or, in this case, "a joint venture" in which the assignor is a party. J.A. 446 citing *Barnes*, 795 F.2d at 362. The Act simply does "'not contemplate that a franchisee should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment.'" J.A. 446 quoting *Barnes*, 795 F.2d at 362. To hold otherwise, the court concluded, would permit a franchisor to "circumvent[ ]" the protection afforded by the statute by the "simple expedient of assigning the franchisor's obligations to an assignee who increases the franchisee's burdens. . . ." J.A. 444 quoting *Barnes*, 795 F.2d at 362.

The court of appeals rejected Shell and Motiva's argument that the breach must result in a total loss or end of one of the statutory elements of the franchise[12] and dubbed the franchisors' efforts to liken a

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[12] While Shell and Motiva argued to the court of appeals, as they do here, that a complete loss or end of one of the statutory elements of the franchise is a prerequisite to a claim under the Act, they did not object to a contrary jury instruction and failed to raise this argument in their motion filed pursuant to Fed. R.

(Continued on following page)

constructive claim under the Act to constructive claims in other areas of law "misleading." J.A. 446. "[S]unk costs, optimism, and a habit of years," the court reasoned, might lead a small businessperson to try to make the new arrangement work, "even where the terms changed so materially as to make success impossible." J.A. 446-447. Indeed, the court noted that after the elimination of the subsidy, many dealers testified that they had "gone into personal debt, driven themselves into bankruptcy, or enlisted the aid of family members working without pay" in an attempt to survive. J.A. 447. Agreeing with the Ninth Circuit's decision in *Pro Sales, Inc. v. Texaco, U.S.A.*, 792 F.2d 1394, 1399 (9th Cir. 1986), the court declared that the "'congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.'" J.A. 447. For this reason, the court held "[w]here a franchisor has breached its obligations to the franchisee such that the franchisee faces the effective end

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Civ. P. 50(a). C.A. App. 118-124. The jury was charged that it could find a constructive termination if the elimination of the subsidy was "such a material change that it effectively ended the lease, even though the plaintiffs continue to operate their business." J.A. 373. Shell and Motiva's counsel endorsed the instruction ("I thought the overall instruction was fine."). C.A. App. 1308. Having failed to object to the jury charge or raise this issue in the Rule 50(a) Motion, the dealers argued to the court of appeals that Shell and Motiva had waived their right to advance a new legal standard on appeal. *Robles-Vazquez v. Garcia*, 110 F.3d 204, 206 n.5 (1st Cir. 1997). The First Circuit did not address the waiver argument in its opinion.

of the franchise, the [Act] must treat that as a termination of the franchise." J.A. 449.

2. The court below noted that the Act is concerned not only with franchise terminations, but also with a franchisor's failure to renew a franchise agreement when it expires because the "reasonable expectations of the parties to a motor fuel franchise are that the relationship will be a continuing one." J.A. 434, n. 2 quoting S. Rep. at 18. Accordingly, the Act forbids "franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices." J.A. 449, n. 13. Nevertheless, the court of appeals rejected the dealers' constructive nonrenewal claim, holding that, procedurally, the Act "requires [a franchisee] faced with objectionable contract terms [to] refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them" and offers relief for a franchisor's improper conduct only upon the franchisor's issuance of a notice of nonrenewal. J.A. 452-453. In other words, a dealer presented with a questionable lease must either sign the lease and forgo the claim that the lease violates the Act, or refuse to sign, wait for a notice of nonrenewal and risk the franchise on the chance that a district court will issue injunctive relief. J.A. 450, 453.

The court of appeals' reluctance to recognize a constructive nonrenewal rested on its belief that the Act's "notice-and-preliminary-relief structure" reflected Congressional intent "to limit the reach of the

PMPA to cases where either a notice is given or an actual nonrenewal has taken place." J.A. 451. The court observed that a notice of nonrenewal itself was "not strictly speaking a nonrenewal," but nevertheless must be treated as the "'equivalent of a nonrenewal,'" J.A. 450 quoting *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 864 (7th Cir. 2002), even though the franchisor may "rescind" the notice at any time before it becomes effective. J.A. 451 citing *Seckler v. Star Enter.*, 124 F.3d 1399, 1403 (11th Cir. 1997). Had the dealers received a notice of nonrenewal, the Act would have permitted them to file suit and seek injunctive relief. J.A. 450-452 quoting *Lippo v. Mobil Oil Corp.*, 776 F.2d 706, 720 (7th Cir. 1985). The court refused to follow the holding in *Pro Sales,* which recognized a claim for constructive nonrenewal where the franchisee signed its renewal lease "under protest" and immediately brought suit under the PMPA. J.A. 451.

SUMMARY OF ARGUMENT

In this case, the jury determined that Shell and Motiva engaged in a concerted effort to take over successful service station franchises without compensating the franchisees for what they had built. Shell and Motiva sought to accomplish this objective by the unilateral imposition of onerous and intolerable terms and conditions intended to force the termination of existing franchise agreements or to make renewals of those agreements a financial impossibility for the

franchisees. Motiva and Shell's conduct in this matter is the poster child for Congress's enactment of the PMPA years earlier.

The principal practical question presented in this case is whether Motiva and Shell's pursuit of its objectives is subject to the PMPA's remedies before these objectives are achieved and before the service station owners are simply out of luck and out of business. The textual linguistic question presented is whether Motiva and Shell's attempts to force terminations and nonrenewals by its deeds but not its words is proscribed by the PMPA.

The dealers believe that the plain language and intent of the Act equally prohibit this conduct and provides a remedy for them. Section 2802 of the Act establishes procedures and criteria for the termination or nonrenewal of franchises. Section 2805 subjects a franchisor's failure to comply with these requirements to an action for damages, injunctive and other relief. This section contemplates pre-termination and pre-nonrenewal relief where necessary.

Shell and Motiva did not follow the prescribed procedures or provide the required notice. Nor did they seek termination and nonrenewal for the permissible reasons outlined by the Act. Instead, they pursued their objectives of termination and nonrenewal under cover of perceived loopholes in the statute. Whether or not this behavior is called "constructive" termination or "constructive" nonrenewal, it is behavior that

is proscribed by the Act and it is behavior that violates the specific criteria and notice provisions of the Act. The Act's remedies should be available in this setting. Those remedies cannot be circumvented under any theory of statutory construction where, as here, the franchisor proceeds on a course of termination or nonrenewal and simply ignores the obligations imposed by the PMPA.

Shell and Motiva's plain language argument is misleading and out of context. Shell and Motiva committed and intended to commit the prohibited acts and no manipulation of the relevant language suffices to make that conduct innocent. The aids to construction relied on by Shell and Motiva and the Solicitor are not persuasive. If some constructive consequences are sufficient to sustain a cause of action and some are not, then Motiva and Shell and the Solicitor have not made a compelling case that Motiva and Shell's behavior in this case is more analogous to the non-actionable constructive effects than to the actionable ones. An opposite conclusion makes far more sense. Congress knew what conduct it intended to sanction and Shell and Motiva surely engaged in that prohibited conduct. The remedy afforded the franchisees for Shell and Motiva's attempt to terminate their franchises is appropriate for this reason.

The court of appeals erred, however, in withholding a remedy for an illegal nonrenewal under the facts found by the jury. The decision of the franchisees to sign renewal documents under protest

while the PMPA suit was pending does not support an argument that they renewed and thus are barred from a claim based on an illegal nonrenewal. Shell and Motiva's bad faith in presenting the renewals and their knowledge that the renewals, if signed, would not allow the dealers to preserve their franchises is well established. The PMPA's protections and remedies should not be so easily undermined by Shell and Motiva's clever strategy. The Act does not accommodate this strategy by its language or structure or intent and the Court should not condone it.

Finally, the Solicitor and amici's concern that allowing the dealers to prevail unfairly prejudices the franchisors when, as a matter of good business judgment, a franchisee deserves to be terminated or nonrenewed is not credible. The franchisees here were succeeding, not failing, and Shell and Motiva wanted to usurp that success for its own benefit. The allowance of a cause of action for the dealers in these cases does not in any way unfairly prejudice franchisors from following the statutory requirements for terminating or nonrenewing franchisees that are not performing. The Court should rule accordingly.

ARGUMENT

I. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE TERMINATION (No. 08-372)

Shell and Motiva construe the PMPA's use of the word "terminate" to mean that a dealer may not invoke the statute's protection unless one of the statutory elements of the franchise – the "contract" to use the refiner's trademark, the "contract" for the supply of motor fuel, or the "lease" of the service station – has come to an end. Petitioners' Brief ("Pet. Br.") at 24; 15 U.S.C. § 2801(17). This theory assumes that a franchisor's attempt to terminate, even if predicated on grounds or in a manner proscribed by the statute, is not actionable unless the attempt results in the loss of one of these elements. The Act's language, design and purpose demonstrate that the protection Congress afforded to dealers under the PMPA is not conditioned upon such a loss.

Section 2805(a) – which contains the statute's enforcement provisions – confers a right of action upon a dealer whenever the franchisor "fails to comply" with any provision of section 2802. 15 U.S.C. § 2805(a). A district court is authorized to enjoin any attempt to terminate or nonrenew the franchise that does not comply with the statute and to "grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply. . . ." *Id.* § 2805(a)(1)-(2), (b)(1). The purpose of injunctive relief is to prevent a termination or nonrenewal where the dealer has raised "sufficiently serious questions going

to the merits" of the termination or nonrenewal. *Id.* § 2805(b)(2)(ii). To accept Shell and Motiva's view of the statute would render the enforcement mechanism meaningless. A court cannot enjoin a franchisor from unlawfully terminating a franchise that has already ended.

A. The Act Authorizes a Dealer to Seek Redress Whenever the Franchisor Fails to Comply with the Requirements of Section 2802 and Vests the Court with Equitable Powers to Remedy Any Such Failure

1. In determining the meaning of a statute, the Court "look[s] not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Dada v. Mukasey*, 128 S.Ct. 2307, 2317 (2008) (citation omitted). Words taken in isolation do not control statutory construction. *Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). *See also United States v. Campos-Serrano*, 404 U.S. 293, 298 (1971) ("If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.").

The Act's enforcement provisions make any failure of the franchisor "to comply with the requirements" of section 2802 actionable, and does not restrict the franchisee's cause of action only to situations where the franchise has come to an end. 15 U.S.C. § 2805(a). That Congress did not intend to so restrict the cause of action is confirmed by the language used in the very same section to frame the claim's limitations period: "[N]o action may be maintained unless commenced within 1 year after the later of (1) the date of termination of the franchise or nonrenewal of the franchise relationship; or (2) the date the franchisor fails to comply with the requirements of section 2802, 2803, or 2807 of this title." *Id.* § 2805(a). Had Congress intended to restrict a franchisee's cause of action to circumstances where the franchise had ended, the language in section 2805(a)(2) would have been unnecessary and irreconcilably in conflict with section 2805(a)(1).

The Act prohibits a franchisor from terminating or nonrenewing a franchise, 15 U.S.C. § 2802(a), unless the franchisor does so pursuant to one of the grounds enumerated in the statute, *id.* § 2802(b)(2)-(3), and provides notice to the franchisee of its "intention" to terminate or nonrenew the franchise, *id.* § 2804(2). The notice must be in writing, state the reason for the termination or nonrenewal, and identify the date on which the termination or nonrenewal will take "effect." *Id.* § 2804(a)(2), 2804(c)(1), (3). Generally, the notice must be given not less than 90 days "prior to the date on which such termination or

nonrenewal takes effect." *Id.* § 2804(a)(2). A notice of termination does not mark the end of the franchise, but is an expression of the franchisor's intention to terminate or nonrenew the franchise at a specified point in the future. Nothing in the Act prohibits a franchisor from extending the effective date or otherwise rescinding the notice. *Seckler*, 124 F.3d at 1403.

A dealer who has "sufficiently serious questions going to the merits" of the attempted termination or nonrenewal is expressly authorized to bring suit and seek injunctive and declaratory relief and damages. 15 U.S.C. § 2805(a), (b), and (d). The action must be commenced within 1 year after the date of the "termination of the franchise or nonrenewal of the franchise relationship" or the franchisor's failure to comply with Section 2802. *Id.* § 2805(a)(1)-(2). In order to establish a claim, the dealer must prove as a threshold matter a "termination" of the franchise or the "nonrenewal of the franchise relationship" within the meaning of the Act. *Id.* § 2805(c). A district court is authorized to issue preliminary and permanent injunctive relief where the franchisee shows that the "franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed." *Id.* § 2805(b)(2). The Act vests the court with power to grant "such equitable relief as the court determines is necessary to remedy the effects of any failure to comply" with the statute. *Id.* § 2805(b)(1).

The requirement that a dealer demonstrate that the franchise of which he is a party "*has been terminated*" as a prerequisite to obtaining an injunction cannot be read to require an end of the franchise before a dealer is afforded relief under the PMPA. Such a requirement would render the relief Congress sought to provide in section 2805 wholly ineffective as it would require a dealer to go out of business before being permitted to seek an order preserving the franchise. Where Congress has specifically provided a mechanism to prevent a franchise from being terminated whenever the grounds or the manner of the termination are in doubt, it makes no sense to read section 2805 as requiring the dealer prove its franchise has ended before granting injunctive relief.

For similar reasons, a notice of termination or nonrenewal – while not "strictly speaking" a termination must be treated as a termination if the injunctive relief section of the Act is to be of any use, as several circuit courts of appeal have acknowledged. J.A. 450; *Dersch Energies, Inc.*, 314 F.3d at 869 quoting *Lippo*, 776 F.2d at 720 ("[i]n an action brought under section 2805(a) the franchisee has the burden of proving termination [or nonrenewal] of the franchise. (This must really mean attempted termination [or nonrenewal] if the injunctive relief is to be of any use.")). Shell and Motiva and the Solicitor likewise acknowledge that a franchisee who receives notice of termination may bring suit under the Act *before* the termination becomes effective. Pet. Br. at 50, 52 (emphasis in original); Brief of the United States

at 16, n. 6 ("It would make little sense for Congress to provide expressly for preliminary injunctive relief but require that the injury actually occur before such relief can be granted.").

There is no good reason that a dealer's rights under the Act should be any different where the franchisor ignores or knowingly circumvents the statute's notice requirements and attempts to terminate the franchise in a manner that is not authorized by the PMPA. Shell and Motiva acknowledge that "[a]ctions . . . speak louder than words" and a termination or nonrenewal can occur "even absent an express statement of termination." Pet. Br. at 34. Congress understood that not all terminations would occur according to the statutory criteria. The mechanisms created to protect franchisees from being terminated while they sought judicial review of the merits of the termination prove that point. The PMPA empowers a court not only to enjoin the termination of the franchise, but arms it with a panoply of equitable powers to remedy a franchisor's failure to comply with the provisions of section 2802 before termination occurs.

In this case, Shell assigned the franchises to Motiva which eliminated an essential component of the lease, the subsidy. The elimination was intended to cause economic harm to the dealers, force an end of their franchises, and convert the stations to ones operated by the franchisor. Neither the reason for the termination nor the means employed by Shell and Motiva to bring it about are permitted by the Act. To

accept Shell and Motiva's view of the Act would have required the dealers to abandon more than their stations, but their livelihoods, as a condition precedent to availing themselves of the PMPA's protection. It would allow a franchisor to ignore the restrictions imposed by section 2802 and render a dealer powerless to seek any relief until it was too late. It simply cannot be that Congress enacted a remedial statute and armed the district court with broad equitable powers, but withheld the protection until the harm the statute was designed to avert already occurred.

Case law recognizing a dealer's right of action under the PMPA where the franchise has not come to an end have labeled the dealers' claims as "constructive" in nature, *e.g.*, "constructive termination" or "constructive nonrenewal." *See infra* 28-35. Constructive means "legally imputed; having an effect in law though not necessarily in fact." *Black's Law Dictionary* (8th ed. 2004) (identifying nearly fifty established applications of "constructive" in the law). A "constructive" application is an exercise in equity, used in the law as a legal fiction to meet the demands of "convenience and justice." *Helvering v. Stockholms Exskilda Bank*, 293 U.S. 84, 92 (1934). The notion of a constructive cause of action fits well within the rights afforded by the PMPA. It certainly is not foreclosed by the Act's definitional section which says only that "termination includes [but is not limited to] cancellation." 15 U.S.C. § 2801(17). But, the designation is unnecessary to sustain the cause of action here

where the prohibited behavior is subject to a statutory remedy.

2. Shell and Motiva's analysis of the "constructive termination" claim fails to consider the injunctive remedy available in section 2805(b) and loses its way in an effort to detach the claim from its statutory setting. The fact that some dealers continued to operate their franchises for a period of time after the subsidy was eliminated is irrelevant to the dealers' claim. The Act's injunctive remedy expressly contemplates that a dealer would continue to operate the franchise during the pendency of the litigation. A dealer whose franchisor seeks to terminate the franchise with proper notice purporting to assert a valid reason for termination can obtain injunctive relief and remain in business while the issues are addressed on the merits. It would be a tortured reading of the PMPA to hold that a dealer that manages to remain in business despite a franchisor's unlawful effort to terminate the franchise is barred from seeking damages under the Act.

Even in circumstances where a court declines to issue injunctive relief, as in this case, or where a franchisee elects not to seek injunctive relief, a dealer who proves a violation of the Act is entitled to an award of damages sustained as a result of the franchisor's misconduct. 15 U.S.C. § 2805(d)(1)(A), (C). "If the franchisee prevails" in its action, the franchisee is entitled to "actual damages" and "reasonable attorney and expert witness fees." *Id.* Unwilling and unable to simply abandon their lives' work, many dealers took

extraordinary steps to remain in business. Such measures were expected: "sunk costs, optimism, and a habit of years might lead franchisees to try and make the new arrangement work, even when the terms have changed so materially as to make success impossible." J.A. 446-447.

B. A Prohibited Termination Occurs When an Assignment of a Franchise (1) Leads to a Breach of One of the Statutory Elements Effectively Ending the Franchise, Or (2) Is Invalid Under State Law

Further evidence that the Act's protection does not require an "end" of the franchise is found in its treatment of assignments. The court of appeals and the overwhelming weight of authority have recognized that a "constructive termination" of the franchise occurs under the Act where an assignment of the franchise results in a breach of one of its statutory elements or is invalid under state law. J.A. 444; *Barnes*, 795 F.2d at 362; *Fresher v. Shell Oil Co.*, 846 F.2d 45, 47 (9th Cir. 1988); *May-Som Gulf v. Chevron U.S.A., Inc.*, 869 F.2d 917, 923 (6th Cir. 1988); *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744, 750-751 (1st Cir. 1991); *Cedar Brook Serv. Station, Inc. v. Chevron U.S.A., Inc.*, 930 F.2d 908 (2d Cir. 1991), *aff'g without op.*, 746 F. Supp. 278; *Shukla v. B.P. Exploration & Oil Co., Inc.*, 115 F.3d 849, 854 (11th Cir. 1997); *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 906-909 (7th Cir. 1997); *cf.*, *April*

Mktg. & Distrib. Corp. v. Diamond Shamrock Ref. & Mktg. Co., 103 F.3d 28, 29-30 (5th Cir. 1997) (indicating that it would recognize a claim if plaintiffs alleged a "breach" of the franchise).[13] *But see Abrams Shell v. Shell Oil Co.*, 343 F.3d 482, 486-488 (5th Cir. 2003) (refusing to recognize a claim of constructive nonrenewal unless one of the "essential components" of the franchise has been "discontinued").

Shell and Motiva focus on the Fourth Circuit's decision in *Barnes* which they characterize as incoherent and suggest that the other circuits somehow have been led astray by that decision to recognize a theory wholly anathema to the PMPA. Pet. Br. at 34-40.[14] While the facts of this case differ in many ways from *Barnes*, the Fourth Circuit's reasoning is grounded in the Act's language, design and purpose and responded directly to the arguments made by Gulf, the original franchisor, and Anderson Oil, the assignee.

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[13] Contrary to Shell and Motiva's assertion that "[n]o other court of appeals had actually relied on *Barnes* to sustain a constructive termination claim until this case," Pet. Br. at 34, the circuits recognizing the claim have relied on *Barnes*, among other authorities. *May-Som Gulf*, 869 F.2d at 922-923; *Chestnut Hill Gulf*, 940 F.2d at 751; *Beachler*, 112 F.3d at 906; *Shukla*, 115 F.3d at 852.

[14] The suggestion that federal courts of appeals unthinkingly fall into lockstep with decisions that "make[ ] no sense" does not resemble the process of decision-making this Court has described in the federal appellate courts. *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991).

In *Barnes*, Gulf contracted to supply Barnes with gasoline at its dealer tank wagon price (DTW). *Barnes*, 795 F.2d at 361. The contract defined the DTW as the "seller's scheduled price in effect" at the time of delivery. *Id.* Following Gulf's assignment, Anderson Oil increased the price of fuel sold to Barnes at a markup over Gulf's DTW which amounted to $1,000 a month and forced Barnes to raise her prices, resulting in a decline in her sales and net income. 795 F.2d at 361. Gulf and Anderson argued that by reason of the assignment, Anderson was now the "seller" and was not obligated to deliver at Gulf's DTW. *Id.*

The Fourth Circuit analyzed two closely related claims concerning the effect of the assignment under the Act. The court first observed that the Act regulates the termination of "any contract pertaining to the supply of fuel." *Barnes*, 795 F.2d at 362 citing 15 U.S.C. § 2801(1)(B)(ii). This is so because Congress recognized that the Act's provisions restricting terminations of the franchise may be circumvented by termination or nonrenewal of the fuel supply agreement. *Id.* citing S. Rep. at 29. Congress also recognized that instances would arise when state assignment law would conflict with the Act's termination provisions, and instead of attempting to fashion hard and fast statutory rules to resolve these conflicts, the Act relied on the courts to resolve them through traditional principles of equity. *Barnes*, 795 F.2d at 362. The assignment and subsequent breach by Anderson Oil had the effect of terminating Gulf's

original contract to supply fuel oil to Barnes. Thus, the court concluded that the Act did "not contemplate that [Barnes] should be relegated to seeking damages from an assignee that might not have the resources to satisfy a judgment" and that Gulf could not "circumvent the protections the Act afford[ed] [Barnes] by the simple expedient of assigning the franchisor's obligation to [Anderson] who increases [Barnes'] burden." *Id.*[15]

Section 2805(a) of the Act provides that if a franchisor terminates a franchise in the absence of one of the grounds enumerated in the statute or without proper notice, the franchisee may bring an action against the franchisor under the Act for damages. *Barnes*, 795 F.2d at 361. Neither Gulf nor Anderson contended that any of the grounds existed to terminate Barnes and conceded that no notice was sent to Barnes. *Id.* The Act and the legislative history led the Fourth Circuit to conclude that the assignment to Anderson and Anderson's subsequent breach implicated the Act because it had the effect of terminating Gulf's original contract to supply gasoline to Barnes. *Barnes*, 795 F.2d at 362 (franchisee can obtain relief

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[15] Shell and Motiva doubt that there is any "federal interest in ensuring deep pockets" to satisfy a dealer's claim under the Act. Pet. Br. at 36. It would be strange indeed for Congress to have enacted remedial legislation and yet have no interest in the dealers' ability to be made whole for losses suffered as a result of the refiner's violation of the statute.

under Act "if the franchisee can no longer obtain gasoline at the stipulated franchise price.").[16]

The Fourth Circuit also recognized that implicit in the Act's provisions regarding assignments was the concept that an assignment unauthorized by state law is prohibited. The court commented that the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise as defined by the Act. "An assignment that is invalid under state law because it increases the franchisee's burden is tantamount to a constructive termination of the franchise." 795 F.2d at 363.[17]

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[16] The First Circuit noted that a delay between the assignment and the breach was not relevant especially where, as here, the assignee is a joint venture in which the franchisor is a party. J.A. 446. *See also Fresher v. Shell Oil Co.*, 846 F.2d 45, 46-47 (9th Cir. 1988); *Riverdale Enters., Inc. v. Shell Oil Co.*, 41 F. Supp. 2d 56, 64 (D. Mass. 1999).

[17] The dealers did not bring a separate count alleging that the assignment to Motiva and the elimination of the subsidy violated state law. There is no doubt, however, that under the district court's instructions the jury's verdict would sustain a determination that it did. The jury concluded that the elimination of the subsidy "was such a material change that it effectively ended the lease. . . ." J.A. 373, 379-380, 449-450. Under Massachusetts law, the assignment would have been invalid because it materially changed the duties or materially increased the burdens of the dealers with the elimination of the subsidy. *American Employers' Ins. Co. v. City of Medford*, 38 Mass. App. Ct. 18, 22, 644 N.E.2d 241, 243 (Mass. App. Ct. 1995) (assignment invalid if it "materially change[s] the duty or risk of the obligor. . . ."); M.G.L. c. 106, § 2-210(2).

Shell and Motiva do little to address the Fourth Circuit's reasoning and its analysis of the Act other than to assert that the "assignment-plus-breach theory" defies the statutory text because the PMPA declares it is neutral with regard to state law assignments. The thrust of their argument is that *Barnes* and the decision below allow claims based on a mere breach of one of the elements of the franchise following an assignment by the franchisor.[18] In other words, constructive termination claims merely federalize breach of contract claims. Pet. Br. at 36-38. As the First Circuit explained, however, not every breach of contract will support a constructive termination claim. In this case, an appropriate threshold was set by requiring a "breach of the lease [that] 'was such a material change that it effectively ended the lease, even though the plaintiffs continued to operate the business.'" J.A. 447.

The First Circuit's standard has solid roots in the Act. Under section 2802(b)(2), termination of a franchise is permitted if there has been a "failure by the franchisee to comply with any provision of the

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[18] Shell and Motiva assert that constructive termination cases have most often involved assignments of the franchise followed by a breach of a statutory element of the franchise. Pet. Br. at. 35. That may be so, but an assignment is not a necessary element of this claim. A franchisor that so materially changes an element of the franchise so as to effectively end it is liable for a constructive termination without any assignment having taken place. *See Yonaty v. Amerada Hess Corp.*, 2005 WL 1460411 (N.D.N.Y. 2005).

franchise, which provision is both reasonable and of material significance to the franchise relationship." The Act also incorporates state assignment law which invokes a "materiality" standard. The First Circuit requirement that there be a breach creating such a material change in one of the elements of a franchise that it effectively ended the contract harkens back to the same statutory standard by which the franchisee's conduct is judged. J.A. 447.

Moreover, Shell and Motiva's complaint of an "incoherent standard" rings hollow. Pet. Br. at 28. Requiring the jury to determine whether Motiva's breach "effectively ended" the lease is no more problematic than asking a jury to determine materiality in a securities fraud context. That standard requires jurors to determine materiality based on whether there is a substantial likelihood that a reasonable investor would consider the omitted fact as having significantly altered the total mix of information available. *Basic Inc. v. Levinson*, 485 U.S. 224, 230-232 (1988). The Court eschewed the need for a bright line rule based on ease of application, which ignored the purpose of the legislation and Congress's policy decision. 485 U.S. at 236.

Shell and Motiva argue that simply because the Act does not authorize assignments that are prohibited by state law "does not mean that 'an assignment that is unauthorized by state law is prohibited' by the PMPA." Pet. Br. at 39. But this is exactly what the Act means. It is incongruous to suggest that Congress intended the Act to be indifferent to an assignment

invalid under state law in light of the 1994 Amendments that preclude terminations or nonrenewals based on a provision that is invalid or unenforceable under the Act.

Finally, Shell and Motiva argue that the language in *Barnes* – that "the unexpired portion of a franchise that has been invalidly assigned is no longer a franchise" – yields perverse results because the dealer would lose the protection of the Act. Pet. Br. at 40. In context, it is clear that the *Barnes* court meant that the franchise was terminated within the meaning of the Act, not that it was no longer a franchise. Neither is there a danger that franchisees will be unprotected. Assignments that violate state law are not self-executing; they require determinations by courts, which are in the best position to exercise the equity powers conferred by the Act to remedy the franchisor's unlawful conduct and to ensure justice.

What the decisions of the Fourth Circuit in *Barnes* and the First Circuit below demonstrate is that, given the Act's treatment of assignments and state law, Congress did not intend to foreclose constructive termination claims or to require that such claims require an "end" of one of the statutory elements. This is entirely consistent with the injunctive remedy available to franchisees under the Act in circumstances where franchisor conduct outside the grounds established by the Act jeopardizes the continuation of the franchise.

C. Analogies to Constructive Terminations in Other Contexts Are Irrelevant and Unpersuasive

1. Shell and Motiva analogize case law interpreting state statutes regulating "franchise terminations in other contexts" to the PMPA and claim that "many" courts have refused to recognize constructive terminations under those statutes. Pet. Br. at 32-34, n. 15.[19] That some state statutes governing franchise

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[19] Many of the cases cited by Shell and Motiva do not foreclose a constructive termination theory. *See, e.g., Speed Auto Sales, Inc. v. Am. Motors Corp.*, 477 F. Supp. 1193 (E.D.N.Y. 1979) (holding only that the facts of the case did not support a claim for constructive termination under New York General Business Law); *Fuller Ford, Inc. v. Ford Motor Co.*, No. CIV. 00-530-B, 2001 WL 920035, *13 (D.N.H. Aug. 6, 2001) ("To the extent that the Motor Vehicle Franchise Act provides for a cause of action in the event of a constructive termination, a plaintiff's proper recourse is to Section 357-C:3 . . ."); *Barney Holland Oil Co. v. FleetCor Techs., Inc.*, 275 F.App'x 351, 359 (5th Cir. 2008) (unpublished) (citing *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169 (2d Cir. 1995), and stating: "[C]onstructive termination claim requires proof of a 'substantial decline in franchisee net income.'"). *Robert Basil Motors, Inc. v. General Motors Corp.*, 2004 WL 1125164, *3-5 (W.D.N.Y. 2004) (recognizing "constructive termination" under the New York Franchised Motor Vehicle Dealer Act even though the franchisee remained in business). Other cases relied on by Shell and Motiva have been questioned. *E.g., In re Kirkwood Kin Corp. v. Dunkin' Donuts, Inc.*, 1997 WL 529587, *9 (Del. Super. 1997) (unpublished) (questioning *Dave Greytak Enters. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 19-21 (Del. Ch. 1992); *JPM, Inc. v. John Deere Industrial Equipment Co.*, 94 F.3d 270, 272 (7th Cir. 1996) (questioning *East Bay Running Store, Inc. v. Nike, Inc.*, 890 F.2d 996, 999 (7th Cir. 1989)). Still others acknowledge constructive terminations. *See Petereit*, 63 F.3d at 1182-1183 (acknowledging that a franchisor's

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relationships outside of the petroleum industry may not recognize constructive terminations is immaterial and unpersuasive. The Act, by its terms, affords a dealer relief when the franchisor attempts to terminate the franchise on grounds and in a manner proscribed by the statute.

2. Similarly, Shell and Motiva argue that the court's decision below is inconsistent with constructive eviction in landlord-tenant law and constructive discharge in employment law. Unlike the relationship between landlord/tenant and employer/employee,

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plan to realign plaintiffs' sales territory could, in appropriate circumstances, "constructively terminate" the franchises in violation of the Connecticut Franchise Act, even where the franchisee remains in business). *See also Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc.*, 408 N.J. Super. 461, 478, 975 A.2d 510, 520 (N.J. Super. App. Div. 2009) ("termination" within meaning of the Franchise Practices Act includes constructive termination); *Carlos v. Philips Bus. Sys., Inc.*, 556 F. Supp. 769, 776 (E.D.N.Y. 1983) (recognizing franchisee's right to bring claim for unlawful "termination" or "nonrenewal" under New Jersey Franchise Practices Act and Connecticut Franchise Act where franchisor eliminated exclusive dealerships even though plaintiff remained in business); *Banc One Fin. Servs., Inc. v. Advanta Mortgage Corp. USA*, 2002 WL 88154, *10 (N.D. Ill. 2002) ("The concept of constructive termination recognizes that a party to a contract can engage in conduct that results in a termination of the contract even though the conduct itself does not actually terminate the contract."); *Bert Smith Oldsmobile, Inc. v. General Motors Corp.*, 2005 WL 1210993, *2 (M.D. Fla. 2005) ("constructive termination 'applies where one party unilaterally modifies the terms' of a contractual relationship in a manner that 'substantially interferes with the other party's ability to obtain the benefits of the contract.' ") (quotation omitted).

Congress recognized that the franchise relationship in the petroleum industry was "unique" because the franchisor grants a trademark license to the franchisee, and, in addition, often controls and leases the service station to the franchisee and "almost always" is the exclusive supplier of motor fuel. S. Rep. at 17. The viability of the franchise is dependent upon a continuing relationship among the parties. *Id.* at 18. The relationship between a landlord and tenant or an employer and employee bears no relationship to the investment by franchisees that Congress sought to protect, the mischief Congress sought to prevent, or the real life contract setting in which Congress framed the rights and obligations of the parties. The court of appeals concluded that the comparisons Shell and Motiva are making here were "misleading." J.A. 446.

The analogy to the common law recognition of constructive eviction is inapposite and outdated. Moreover, Shell and Motiva's blanket statement that the law only recognizes constructive evictions where the tenant has vacated the premises is not entirely accurate.[20] Courts now recognize that a lease is, in essence, "a contractual relationship" and reject the notion that a tenant's right to seek redress for

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[20] *See e.g.*, *Marini v. Ireland*, 56 N.J. 130, 146, 246 A.2d 526, 535 (N.J. 1970) (tenant not required to vacate premises); *Minjak v. Randolph*, 528 N.Y.S.2d 554, 140 A.2d 245, 248 (N.Y. 1st Dep't 1988) (same); *County Holding Corp. v. Brati Inc.*, 2002 WL 1275031 (N.Y. Supp. App. Term. 2002) (same).

unsuitable conditions is predicated upon abandonment of the premises.[21] Although the court of appeals properly declined to draw comparisons between the Act and common law constructive evictions,[22] it should be noted that, as the New Jersey Supreme Court did in *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (N.J. 1969), contract remedies evolved from the recognition of the "inequality of bargaining power between landlord and tenant" and the harshness of the *caveat emptor* doctrine embodied in the traditional view of leases.

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[21] By adopting the view that a lease is essentially a contractual relationship, a more consistent and responsive set of remedies are available for a tenant. They are the basic contract remedies of damages, reformation, and rescission. *Restatement (Second) of Property* § 11.3 & comment a (1977) (allowing rent to be abated until default is cured and noting that traditional remedy of constructive eviction which requires abandonment of premises is too costly); *Restatement (Second) of Property* § 5.4(2)(a), (c) (1977) (where landlord's default makes property "unsuitable" tenant may continue lease and seek damages or use rent to eliminate unsuitable condition); *Restatement (Second) of Property* § 5.4 & comment b (1977); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1083 (D.C. Cir. 1970) (if landlord failed to perform obligation to maintain the premises in habitable condition, tenant may remain in premises and suspend obligation to pay rent (in whole or in part)); *Hilder v. St. Peter*, 144 Vt. 150, 158-160, 478 A.2d 202, 207 (1984); *Harel Assoc. v. Cooper Healthcare Prof'l Servs., Inc.*, 271 N.J. Super. 405, 408, 638 A.2d 921, 923 (N.J. Super. 1994).

[22] As this Court has noted in another context, "the body of private property law . . . more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." *Javins*, 428 F.2d at 1074 quoting *Jones v. United States*, 362 U.S. 257, 266 (1960).

Finally, there is no indication in the text or history of the PMPA that Congress had any particular or analogous settings in mind when drafting the Act, and in no case would Congress have been bound to incorporate any pattern of interpretation, analogous or not. The Act reflects Congress's identification of prohibited acts and appropriate remedies. That must be the principal focus in interpreting the statute. What happens in some other legal environment may or may not be helpful. For the most part, the analogies embraced by Shell and Motiva are neither compelling, helpful, nor accurately described.

D. The Statutory Construction Urged By the Solicitor and Amici Does Not Honor the Words or the Intent of the PMPA

1. The Solicitor argues that in upholding the dealers' claim for constructive termination, the First Circuit had an incomplete understanding of the PMPA's purpose and history. According to the Solicitor, the Act reflects a compromise and delicate balance between competing interests of franchisors and franchisees that the court below upset by emphasizing franchisee protection to the exclusion of franchisor flexibility. Brief for the United States at 13-14. The Solicitor presents a skewed picture of the Act and its legislative history that focuses on isolated statements by congressmen and ignores the language of the Act itself. The House and Senate Reports make clear that the primary object of the PMPA was

prophylactic, both to avoid harm by mandating certain conduct by franchisors and by making franchisees whole for violations of the Act. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (authoritative source for finding Congress's intent lies in Committee Reports rather than passing comments of members or casual statements in floor debates). In the PMPA, as with Title VII, Congress "took care to arm courts with full equitable powers" to secure complete justice for franchisees. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). "For it is the historic purpose of equity to 'secur[e] complete justice.'" *Id. citing Brown v. Swann*, 10 Pet. 497, 503 (1836). Indeed, by its terms the Act contemplates a court's use of equitable relief as "necessary to remedy the effects of any failure [by the franchisor] to comply with the requirements" of the Act. *See* 15 U.S.C. § 2805(b)(1). Conversely, franchisors' interests with respect to termination and nonrenewal are tightly circumscribed in the Act, both in substance and procedure.

In short, there is no delicate balance of rights or requirements in the Act, and the Solicitor does not explain how the availability of constructive termination somehow deprives or even infringes on whatever "flexibility" the Act provides to franchisors. Nothing in the legislative history undermines the recognition by several courts of appeals that "[a]s remedial legislation, the PMPA must be given 'a liberal construction consistent with its overriding purpose to protect franchisees.'" *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 904 (7th Cir. 1997) (citation omitted). The

Act surely does not preclude franchisors from terminating or refusing to renew a failing or bad franchise, it simply requires franchisors to follow the procedures in the Act in doing so. There is no delicate balance to protect where, as here, according to the jury, the franchisor embarked upon a concerted effort to take over these franchises by breaking the back of the franchisees and denying them fair compensation for their loss. The Solicitor's argument, if it could be persuasive in any case, is surely not relevant here.

2. Amicus Curiae The American Petroleum Institute ("Institute") argues that the theory of constructive termination frustrates Congress's goal of uniform standards because it depends on the application of state law. Institute Brief at 18-22. There is nothing remarkable in the application of state law in this case. The Act and the legislative history make clear that Congress's statutory design is not as hidebound as the Institute suggests and certainly does not require the rejection of constructive termination theories.

Aside from the limited reach of preemption, the Act contemplates the interplay of its provisions with state law. The 1994 Amendments prohibited the release or waiver of any right franchisees had under state and Federal law, 15 U.S.C. § 2805(f), and expanded the definition of failure to prohibit terminations and nonrenewals based on contract provisions illegal or unenforceable under state law. *Id.* § 2801(13). In adding to the definition of failure to exclude terminations or nonrenewals based on provisions

unlawful or unenforceable under state law, the 1994 Amendments overruled cases like *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, which rejected a PMPA claim based on the franchisor's requirement that the franchisee operate 24 hours, which the franchisee argued was unlawful under state law.[23] The Third Circuit ruled that the PMPA did not incorporate state law. *Id.* at 589-590. Finally, the Act leaves the validity of assignments to state law and recognizes that assignment contrary to state law may constitute a termination of a franchise under the Act.

In sum, the PMPA contemplates the application of state law. That constructive termination claims may rest in part on the application of state law is therefore uneventful and does not require the rejection of that theory. No argument is made that in this case the application of Massachusetts law somehow imposed a requirement or prohibition on Motiva or Shell not grounded in the Act.

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[23] In *O'Shea* the franchisee claimed that the 24-hour provision violated New Jersey's Franchise Practices Act, which prohibited any franchisor, directly or indirectly, to impose unreasonable standards of performance on a franchisee. The Third Circuit rejected the franchisee's claim that a termination based on an unenforceable provision of the contract under state law violated the PMPA. *Id.* at 589-590.

II. THE ACT'S LANGUAGE, DESIGN AND PURPOSE RECOGNIZE A CLAIM FOR CONSTRUCTIVE NONRENEWAL (No. 08-240)

Section 2802 of the Act prohibits a franchisor from insisting on changes or additions to franchise agreements if they are "for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor or otherwise preventing the renewal of the franchise relationship." 15 U.S.C. § 2802(b)(3)(A)(ii). The jury found that new provisions in the Motiva leases were designed to discourage the dealers from signing the leases and enable Motiva to unlawfully convert their stations. J.A. 375, 382. The court of appeals agreed that Motiva's conduct violated the Act,[24] but nonetheless rejected the jury's determination that the franchises had been constructively nonrenewed because it believed that the dealers "ratif[ied]" the unlawful terms by signing the leases. J.A. 453. According to the court below and Shell and Motiva, had the dealers refused to sign the leases and waited for the franchisor to send a notice of nonrenewal, then the dealers would have a claim under the Act. J.A. 453; Pet. Br. p. 50. The court's decision ignores the PMPA's

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[24] The court of appeals recognized that the Act forbids "franchisors using their power to dictate impossible franchise terms in order to force the franchisees to walk away from their investments or to sell them at artificially low prices," J.A. 449, n. 13, and the plan to force dealers out of business "falls within the scope of the PMPA, . . . " J.A. 447-448.

language, design and purpose, and above all else, elevates form over substance.

A. The Act Does Not Require Issuance of a Notice As a Condition Precedent to Bringing a Claim that the Franchisor Failed to Comply with Section 2802

The enforcement provisions set forth in section 2805(a) make any failure of the franchisor "to comply with the requirements" of section 2802 actionable; there is no reference in section 2805(a) to a "notice" of any kind as a condition precedent to seeking redress under the statute. 15 U.S.C. § 2805(a). Indeed, the only time the PMPA requires the issuance of a notice is when the franchisor intends to lawfully terminate or nonrenew the franchise on grounds enumerated in the statute. *Id.* § 2802(b)(1)(A). The jury found that Shell and Motiva failed to comply with section 2802 because provisions in the Motiva leases were designed to discourage the dealers from signing the leases and enable Motiva to unlawfully convert their stations. J.A. 375, 382. Since the Act does not require the issuance of a notice as a prerequisite to maintaining suit where the franchisor fails to comply with section 2802, it was error for the court of appeals to reverse the jury's verdict on the constructive nonrenewal claim.

Had the dealers refused to sign the leases and had notices of nonrenewal then been issued, the court of appeals and Shell and Motiva concede a cause of

action under the statute. J.A. 453; Pet. Br. at 50, 52. On this record, the same verdict would have been reached: Shell and Motiva violated the PMPA because the lease terms were improper. As noted earlier, *supra* at 22-26,[25] a notice of nonrenewal, while not strictly speaking a nonrenewal, must be treated as one if the injunctive relief section of the Act is to be of any use. The court of appeals, Shell and Motiva, and the amici agree with this proposition and acknowledge that a franchisee who receives notice of nonrenewal may bring suit under the Act before the nonrenewal becomes effective. J.A. 450; Pet. Br. at 50, 52; *See also*, Brief of the United States at 16, n. 6. This is so because under the Act, a notice of nonrenewal is treated as the "precise equivalent of a nonrenewal." *Dersch Energies, Inc.*, 314 F.3d at 864, citing *Lippo*, 776 F.2d at 720.

There is no good reason why a dealer's rights under the Act should be any different where, in lieu of a written notice, the franchisor presents an unlawful lease on a "take-it-or-leave-it" basis and unequivocally states that it will terminate the franchise if the dealer refuses to sign the lease. The Hobson's Choice presented by the court of appeals – sign the lease and waive any claims under the Act, or refuse to sign, wait for a notice of termination and hope to establish with sufficient proof that the equities warrant a

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[25] Many features of the Act discussed earlier in connection with the constructive termination apply to the constructive nonrenewal claim.

preliminary injunction – is no choice at all. It forces a dealer to risk losing his business as a prerequisite to seeking redress under the PMPA. The court of appeal's view of the statute is inconsistent with the protection Congress intended to provide. Few franchisees presented with oppressive franchise agreements that arguably violate the Act have the economic wherewithal to cease operations and engage in protracted battles against formidable opponents like Shell/Motiva.[26]

The court of appeals was also concerned that a dealer who signs the renewal agreement under protest and then brings suit does not "risk[ ] the end of the franchise if the claim fails," but provides no reasonable explanation why the language of the Act requires any risk. J.A. 453. Indeed, it is a rather jarring conclusion when considered in light of the disparate bargaining power of the parties and the very purpose of the Act to provide a counterbalance for the franchisees. Even granting the court's assumption that the dealer does not take any risk,[27]

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[26] During the course of the litigation, Shell and Motiva filed two motions to dismiss and three motions for summary judgment, all of which were denied. J.A. 2, 10, 133. The district court and the court of appeals noted unreasonable and "inexcusable" delays in the proceedings attributable to Shell and Motiva. J.A. 439, n.7; J.A. 126.

[27] By signing and then challenging the lease the dealers not only subjected themselves to the expense of the litigation, but also to the risk that the dealers would have to reimburse petitioners' for their fees and costs if the dealers were unsuccessful in their claim. *See e.g.*, J.A. 299-300 (lease allows Motiva to

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that does not mean that the franchisee will somehow benefit from a windfall and does not in any way undermine or harm the franchisor's rights under the Act. One reasonably assumes that the leases proffered by Motiva in this case reflected arrangements that Motiva thought beneficial to its business interests and the dealers' payment of rent during the period that they remained in business caused Motiva no harm.

B. Whether the Dealers "Ratified" or "Accepted" the Motiva Leases Was Not Presented to the Jury

The court of appeals' suggestion that signing the Motiva leases "under protest" somehow "ratified" the unlawful lease terms effectively turns the definition of ratification on its head. Ratification requires voluntary action, and this Court has recognized in other contexts that causes of action are not barred where payments have been made "under protest" when faced with a choice between making an improper payment or discontinuing an entire line of business. *See United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 368 n. 11 (1973) (payments "were obtained only by coercion; they were paid under protest; and thus they hardly can be said to have been voluntary."); *United States v. Williams*, 514 U.S.

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recover attorney's fees incurred "to secure or protect" rights under lease).

527, 532 (1995) ("Assumpsit refund actions were unavailable to volunteers, a limit that would not have barred Williams because she paid under protest.") (*citing Philadelphia v. Collector*, 5 Wall. 720, 731-732 (1867) ("Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back. . . ."); *Dada*, 128 S.Ct. at 2317 (Court declined to construe statute to remove important safeguard where text did not preclude safeguard); *see also Ex Parte Wright*, 443 So.2d 40, 41-42 (Ala. 1983) (contracts signed under protest preserved right of teachers to challenge contracts under Alabama Teacher Tenure Act). Even under Uniform Commercial Code, "[a] party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." U.C.C. § 1-207(1) (1990). Here, in addition to signing the leases under protest, dealers' legal counsel wrote to Motiva (before any dealer signed a renewal lease) to protest the legality of the new leases and "reserve all rights and causes of action" available to the dealers to challenge the new leases. J.A. 129-131; Pet. Br. at 11, n. 7. The dealers also initiated this lawsuit *before* they signed the Motiva leases.

Shell and Motiva couch their argument in slightly different terms than the court below and assert that the dealers have no claim under the Act because they signed and therefore "accepted" the new leases. Pet. Br. at 49-50. Shell and Motiva agree that new lease terms adopted with "[b]ad motives can transform an otherwise permissible non-renewal into an unjustified one." Pet. Br. 49. They contend, nevertheless, that bad motives cannot transform a renewal into a nonrenewal where the dealer signs the renewal agreement. *Id.*

Whether under these circumstances, the dealers "ratified" the agreement presented a question of fact for the jury. *Bui v. Ma*, 62 Mass. App. Ct. 553, 565, 818 N.E.2d 572, 581 (Mass. App. Ct. 2004) ("ratification is essentially a question of fact"); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 642, 863 N.E.2d 503, 514-515 (Mass. 2007). Shell and Motiva did not, however, request an instruction or verdict question on this issue or raise it in their post-trial motions; it may not be raised now. *Robles-Vazquez*, 110 F.3d at 206 & n. 5. *See also Guzman v. Visalia Community Bank*, 71 Cal.App.4th 1370, 1376 (Cal. App. 5th Dist. 1999) citing 1 *Corbin on Contracts* (rev. ed. 1993) § 3.30, p. 477.[28]

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[28] A somewhat related question – whether releases signed by two dealers were ineffective because they were signed under "duress" – was presented to the jury, which determined that the signatures were procured under duress and, therefore, the releases were not enforceable. J.A. 386; C.A. App. pp. 90-91.

C. The Act's Structure and Purpose Support the Holding in *Pro Sales*

The First Circuit declined to follow the holding in *Pro Sales,* in which the Ninth Circuit rejected a restrictive reading of the PMPA where "a franchisee would be forced to choose between accepting an unlawful and coercive contract in order to stay in business [or] rejecting it and going out of business in order to preserve a cause of action." 792 F.2d at 1399 (citation omitted).[29] "Such a Catch-22 is inconsistent with congressional intent." *Id.* Congress, the court noted, was concerned with threats of nonrenewal as well as actual nonrenewals, and requiring an actual nonrenewal gives no relief from threats, only from actions. The court also acknowledged the force of simple economics: "Indeed, such a rule might provide an incentive to the franchisor to insist on a contract that is illegal under the PMPA but with which the franchisee can stay in business, because the franchisee would have to go out of business and file suit to contest the legality of the terms, something few

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[29] Several district courts have allowed constructive nonrenewal claims based on this reasoning. *See Dean v. Kerr-McGee Ref. Corp.*, 714 F. Supp. 1155, 1158 (W.D. Okla. 1988); *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 771 n.2 (E.D. Pa. 1983); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 329 (D.N.J. 1982); *RKJ Enters., Inc. v. Sun Co., Inc.*, 1998 WL 833857, *3 (E.D. Pa. Dec. 2, 1998) ("Congress did not intend to force a franchisee to abandon the franchise relationship to invoke the protection of a law designed to protect a franchisee's interest in continuing that relationship"); *Sun Franchise Ass'n v. Sun Ref. and Mktg. Co.*, 1992 WL 97359, *4 (E.D. Pa. April 29, 1992).

franchisees can afford to do." *Id.* Consequently, the court ruled that "a franchisee who signs a successor contract under protest and promptly seeks to invoke its rights under the PMPA . . . has not 'renewed' the franchise relationship so as to bar relief under the PMPA." *Id.* "To require an actual abandonment of years of work and investment before we recognize a right of action under the PMPA would be unreasonable. The 'congressional plan would be frustrated by requiring a franchisee to go out of business before invoking the protections of the PMPA.'" *Pro Sales*, 792 F.2d at 1399.

1. The First Circuit instead adopted the reasoning in *Dersch*, which addressed a violation of section 2805(f), not section 2802, and held that procedurally the Act "requires [a franchisee] faced with objectionable contract terms [to] refrain from ratifying those terms by executing the contracts (even 'under protest') and operating under them" and offers relief for a franchisor's improper conduct only when there is an actual nonrenewal of the franchise relationship. J.A. 452-453 (citing *Dersch Energies, Inc.*, 314 F.3d at 866). The holding in *Dersch* is inconsistent with earlier cases decided by the Seventh Circuit, is vigorously contested by the dissent, and is fundamentally at odds with the PMPA.

In any action brought under section 2805(a), the franchisee has the burden of proving the "termination of the franchise or the nonrenewal of the franchise relationship." 15 U.S.C. § 2805(c). In *Lippo*, the Seventh Circuit noted that "[t]his must really mean

attempted termination if the injunctive relief is to be of any use." *Lippo*, 776 F.2d at 720. In a later decision, the Seventh Circuit accepted the viability of a claim for constructive termination where an assignment of the franchise results in the breach of an "essential component of the statutory franchise or violates state law." *Beachler*, 112 F.3d at 907.[30] These decisions accept the proposition that a dealer may bring a claim under the Act even though the dealer remains in business and without the issuance of a notice of termination. In other words, a termination or nonrenewal within the meaning of the PMPA does not require an "end" to the relationship nor is notice of termination or nonrenewal a condition precedent to bringing suit. Indeed, *Dersch* notes, as do Shell and Motiva, that there are "situations where a franchisor's actions will indirectly result in termination or nonrenewal of a franchise or the nonrenewal of the franchise relationship – an informal termination or nonrenewal." *Dersch*, 314 F.3d at 859. It is against this backdrop that the holding in *Dersch* – that a dealer cannot maintain an action for unlawful nonrenewal unless it refuses to sign the lease and is issued a notice of nonrenewal – simply makes no sense.

The holding in *Dersch* is not only inconsistent with earlier Seventh Circuit decisions, it is internally

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[30] *Dersch* misstates the holding in *Beachler* when it states that a claim for constructive termination requires the "discontinu[ance]" of one of the statutory elements of the franchise. *Dersch*, 314 F.3d at 859.

inconsistent. For example, the court holds that "a formal notice of nonrenewal is not necessarily a prerequisite to filing suit under the PMPA," *Dersch* 314 F.3d at 866, n. 20, but then rejects Dersch's claim precisely because his franchisor did not issue a notice of nonrenewal. *Id.* at 866. The court contends that a franchisee is protected against terminations because "'a franchisor cannot terminate without providing requisite notice,'" *id.* at 865 quoting *Shell v. Shell Oil Co.*, 216 F. Supp. 2d 634, 640 (S.D. Tex. 2002), but also acknowledges that sometimes a franchisor's actions will "indirectly result" in a nonrenewal. *Dersch* 314 F.3d at 859. It is this type of inconsistency that led to a vigorous dissent. *Dersch,* 314 F.3d at 867-875.

The timing of a suit challenging the renewal lease concerned the First Circuit: "Allowing a franchisee to sign 'under protest' and then later challenge the renewal would extend the period of uncertainty through the entire first year of a contract that in this case was only three years." J.A. 453. Unlike Dersch, who signed his lease under protest, but waited nearly a year to bring suit, all but one of the dealers brought suit *before* signing the Motiva leases, a fact that the court of appeals overlooked. Even had the petitioners forced Motiva to issue notices of nonrenewal, there is every likelihood that the case would have engaged the parties and the district court for the same period of uncertainty.

CONCLUSION

The judgment of the court of appeals should be affirmed with respect to the termination claim (No. 08-373) and reversed with respect to the nonrenewal claim (No. 08-240). Additionally, the dealers should be awarded their reasonable attorneys' fees and costs incurred in connection with this appeal pursuant to 15 U.S.C. § 2805(d)(1)(C); *D'Arcy v. Union Oil Co. of California*, 937 F.2d 611, 1991 WL 127649, *5 (9th Cir. 1991) (unpublished decision).

Respectfully submitted,

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